89-766

NO. _____

IN THE

Supreme Court of the United States

OCTOBER, 1989 TERM

BARBARA SLAUGHTER,
Petitioner

v.

AT & T INFORMATION SYSTEMS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GARY L. MCCONNELL
MCCONNELL & KLEMENT, P.C.
P.O. Box 1667
Angleton, Texas 77516-1667
409/849-2474

Attorney for Petitioner

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

29 pp

QUESTION PRESENTED

1. Whether Petitioner's claims against her employer and union were properly characterized by the lower courts as constituting a "hybrid" sec. 301/duty of fair representation cause of action to which *DelCostello's* six-month statute of limitations was applicable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NO. _____

IN THE

Supreme Court of the United States

OCTOBER, 1989 TERM

BARBARA SLAUGHTER,
Petitioner

v.

AT & T INFORMATION SYSTEMS, INC.,*
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARBARA SLAUGHTER petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a - 7a) is not reported. No opinion was issued by the district court. The judgment of the district court (App. B, infra, 8a) was entered on December 16, 1988.

* The other party to the proceeding in the court whose judgment is sought to be reviewed was Communications Workers of America, Defendant.

JURISDICTION

A petition for rehearing to the court of appeals was denied on August 8, 1989 (App. C, infra, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

STATUTES INVOLVED

1. Sec. 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, codified at 29 U.S.C. sec. 185 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Sec. 10(b) of the National Labor Relations Act of 1947, 49 Stat. 453, codified at 29 U.S.C. sec. 106(b) provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the

filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

STATEMENT

Petitioner, a former employee of Respondent, terminated her employment on February 28, 1986. At the time of her termination, she was a non-management employee represented by the Communications Workers of America (CWA). Petitioner claims she was a "surplus union-represented, non-management employee" at the time of her termination as defined in Respondent's written termination plan. As such, she sought termination pay that was denied by Respondent. Petitioner, prior to her termination, requested CWA to file a grievance on her behalf with Respondent to determine her entitlement to termination pay; Petitioner subsequently learned that CWA failed to file a written grievance within the forty-five day period allowed by the termination plan.

Lacking any other remedy, Petitioner brought a state court suit almost two years after her termination against Respondent and CWA alleging certain tort and contract claims, including CWA's alleged breach of duty of fair representation. Respondent and CWA removed the case to federal court on the ground that Petitioner's claims were completely pre-empted under sec. 301 of the Labor Management Relations Act. Subsequently, both defendants moved for summary judgment based upon the untimeliness of Petitioner's suit under the six-month statute

of limitations of sec. 10(b) of the National Labor Relations Act (NLRA), characterizing her claim as a "hybrid" sec. 301/duty of fair representation cause of action found subject to NLRA's limitations period in *DelCostello v. Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983). The district court granted summary judgment in favor of Respondent and CWA, and the court of appeals affirmed.

REASONS FOR GRANTING THE PETITION

This case presents a departure from the accepted and usual course of judicial proceedings by the lower courts as to call for an exercise of this Court's power of supervision. The district court, arbitrarily and without sufficient evidence before it on a summary judgment motion, mischaracterized Petitioner's cause of action as a "hybrid" sec. 301/duty of fair representation claim to which the six-month statute of limitations was applicable. The court of appeals, failing and refusing to follow its own analysis set forth in *Daigle v. Gulf States Utilities Co.*, 794 F.2d 974 (5th Cir. 1986), *cert. den.*, 479 U.S. 1008, 107 S. Ct. 648, 93 L.Ed.2d 704 (1986), affirmed the district court summary judgment, holding simply that the "six-month statute of limitations applies to all sec. 301 hybrid actions where a plaintiff has alleged a breach of a collective bargaining agreement as well as breach of the union's duty of fair representation" (App. 6a). With absolutely no analysis, the court of appeals pronounced that Petitioner's claim against Respondent was a "hybrid action to which the six-month statute of limitations applies" (App. 6a). As will be demonstrated, Petitioner's claim is either (1) not a "hybrid action" as a matter of law or (2) not characterizable under the summary judgment

evidence, and thus a material fact issue is presented as to the nature of her action.

DelCostello is, of course, the seminal case wherein this Court first introduced sec. 10(b)'s six-month statute of limitations as a bar to an employee's claim against his employer and union arising from circumstances akin to an unfair labor practice. When an employee brings a suit against his employer resting upon a breach of the collective bargaining agreement, where he is required to exhaust the grievance or arbitration remedies provided in the agreement, this Court held that he could not challenge the results of such remedies unless he sought, in the same action, to show that his union represented him in such grievance or arbitration procedure in "such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation". *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967). Finding such claims on the part of an employee not to be the "straightforward breach-of-contract suit" made subject to analogous state law limitations periods in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107, 16 L.Ed.2d 192 (1966), this Court proclaimed them to be "hybrid sec. 301/fair representation claim(s), amounting to a direct challenge to the private settlement of disputes under the collective bargaining agreement". *DelCostello, supra*, 2291.

Both this Court and the court of appeals recognized that proper characterization of a plaintiff's claim arising from an employment dispute is critical to the outcome of an asserted limitations defense by a defendant. In *IBEW v. Hechler*, 481 U.S. 851, 107 S. Ct. 2161, 2169, 95 L.Ed.2d 791 (1987), this Court rejected the union's contention that the employee's claim could be character-

ized only as a breach of the duty of fair representation when she sued the union in state court on a tort theory. While holding that the employee's claim was wholly preempted by sec. 301, this Court remanded her claim to the court of appeals on her argument that her suit was simply a sec. 301 claim to which an analogous state law limitations period should apply. *Id.* On remand, the court of appeals stated its duty as follows:

> "We must adopt a state law limitations period if it provides a direct analogy to the particular sec. 301 claim at issue and if it adequately comports with the policies underlying federal labor law. Otherwise, 'if state law does not afford sufficiently direct guidance,' we are to use sec. 10(b)."

Hechler v. IBEW, 834 F.2d 942, 947 (11th Cir. 1987). Applying a "fluid balancing test", the court of appeals found that Hechler's claim against the union lacked any threat to the stability of federal labor law and applied a state law limitations period for a tort action arising from contract.

While recognizing that this Court distinguished the "hybrid" sec. 301/fair representation claim from the "straightforward sec. 301 breach-of-contract" suit in *DelCostello*, 462 U.S. at 165, 103 S. Ct. at 2291, *Hechler* clearly established that a breach-of-duty suit in state court against a union does not automatically characterize the plaintiff's claim as a breach of duty of fair representation to which sec. 10(b)'s six-month limitations bar applies. The lower courts in this case simply accepted Respondent's allegation that Petitioner's claim was a "garden variety" hybrid sec. 301/duty of fair representation allegation.

The court of appeals' affirmation of the district court's summary judgment on the stated basis that "(t)he six-month statute of limitations applies to all sec. 301 hybrid actions where a plaintiff has alleged a breach of a collective bargaining agreement as well as breach of the union's duty of fair representation" is inexplicable when the facts of this case are compared to *Daigle v. Gulf States Utilities Co., supra.* Daigle was discharged by Gulf States Utilities Co. (GSU) for violating a company rule. He applied to his union, the International Brotherhood of Electrical Workers (IBEW), for help, and, after investigating, IBEW refused to file a grievance. Daigle subsequently brought suit for (1) breach of collective bargaining agreement against GSU and (2) for IBEW's breach of its implied duty of fair representation. *Id.*, 976. Daigle's claims against GSU and IBEW suffered the same fate as Petitioner's at the district court level, apparently on the same ground that his claims constituted a hybrid sec. 301 action that was time-barred under *DelCostello. Id.* The court of appeals commenced its analysis of Daigle's claims by stating:

> "We must characterize the appellant's breach of contract and duty of fair representation claims to determine the applicable statute of limitations."

Id., 977. The court recognized that the hybrid sec. 301 suit gains its characterization from the "inextricable interdependent" nature of the two causes of action arising from the provisions of the collective bargaining agreement:

> "If the arbitration and grievance procedure is *the exclusive and final remedy* for breach of the collective bargaining agreement, the employee may not

> sue his employer under sec. 301 until he has exhausted the procedure . . . On the other hand, *if the collective bargaining agreement does not provide that the grievance and arbitration procedure is the exclusive and final remedy* for breach of contract claims, the employee may sue his employer in federal court under sec. 301 (citations omitted) and the state statute of limitations applicable to contract breaches applies."

Id. (Emphasis added). The court thus remanded Daigle's cause of action because the record did not reflect whether he was required by the collective bargaining agreement to exhaust his grievance and arbitration remedies.

Comparisons between *Daigle* and Petitioner's claims are inevitable and compelling. Even the court of appeals, in a footnote in its opinion (App. 4a - 5a), recognized the similarity of the claims, but for the wrong reason. The court of appeals wholly failed to indulge in even the slightest analysis of the appropriate character of Petitioner's claim; instead, the court merely accepted Respondent's characterization of her claims. What *Daigle* makes clear is that the characterization of Petitioner's claim against Respondent depends entirely upon a review of the grievance and arbitration procedures within the collective bargaining agreement in order to determine whether Petitioner was required to first exhaust her contractual remedies before pursuing her claim in the courts. Both lower courts ignored this procedure, with the result that *DelCostello's* six-month limitations period was improperly applied.

The applicable portion of the grievance and arbitration procedures of the collective bargaining agreement (App. 10a - 16a) clearly shows that such procedures are not

required to be exhausted by an employee. In fact, the wording of the arbitration provision reflects an intent to be permissive and not mandatory ("either the Union or Management may submit the issue of any such matter to arbitration . . .") (App. 14a). In considering the identical language from the same collective bargaining agreement, the district court, in *Eltsner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328, 1338-1339 (S.D. Tex. 1987), held that the agreement did not provide that the grievance procedure was the exclusive and final remedy for the plaintiff's claim of breach of the agreement, and thus his right to sue in court was not barred. In this case, the court of appeals found that Petitioner stated a sec. 301 claim by her suit for termination benefits. Because, as the *Eltsner* court decided, the agreement in question made no provision for finality of the grievance procedures, Petitioner was not required to exhaust her contractual remedies before filing suit against Respondent. As a result, the *Daigle* analysis applies and her claim is subject to an analogous state law limitations period[1] rather than the six months mandated by sec. 10(b).

In sum, Petitioner would echo the sentiments of the court of appeals in *Hechler*:

> "the sheer number of cases applying sec. 10(b)'s six-month limitation period to various labor lawsuits indicates that such a brief time has the practical effect of barring many potentially meritorious claims. Until the Supreme Court provides clear instructions

---

1. Tex. Civ. Prac. & Rem. Code Ann. sec. 16.004 (Vernon's 1986), establishing a four-year limitations period for certain debt actions, has been construed to apply to employment contracts. *See City of Groves v. Ponder*, 303 S.W.2d 485, 488-489 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.) (construing predecessor statute).

to depart from the general rule of applying analogous state limitations periods to breach-of-contract cases under sec. 301, this court will hold to its narrower reading of *DelCostello*."

Hechler v. IBEW, 834 F.2d at 949.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY L. MCCONNELL
MCCONNELL & KLEMENT, P.C.
105 South Chenango
P.O. Box 1667
Angleton, Texas 77516-1667
409/849-2474
State Bar No. 13442600

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2058

Summary Calendar

BARBARA SLAUGHTER,
Plaintiff-Appellant,

v.

AT&T INFORMATION SYSTEMS, INC., AND
COMMUNICATION WORKERS OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-88-0486)

(July 7, 1989)

Before REAVLEY, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:*

Barbara Slaughter appeals from the district court's summary judgment dismissal of her claims against her

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

employer for breach of contract and against her union for breach of the duty of fair representation. Because we find that the district court did not err in determining that the six months statute of limitations applicable to claims arising under Section 301 of the Labor Management Relations Act time bars the claims, we affirm.

I. BACKGROUND.

In January of 1988, Slaughter filed an action in the district court of Brazoria County, Texas, alleging that her employer, defendant AT&T Information Systems, Inc. (ATTIS), refused to tender termination pay upon her termination in February of 1986. She alleges that ATTIS instead forced her to elect supplemental income protection program benefits. Slaughter claims that at her termination she was a "surplus union-represented, non-management employee" as defined in ATTIS's Termination Payment Plan; as such, she argues, termination pay was appropriate.

After ATTIS's denial of her request for termination pay, Slaughter requested that her union, the Communication Workers of America (CWA), file a grievance on her behalf. In May of 1986, Slaughter learned that no such grievance had ever been filed. Consequently, Slaughter included in her petition an allegation that CWA was negligent in failing to file a grievance on her behalf under the terms of the collective bargaining agreement existing between ATTIS and CWA.

The defendants filed petitions for removal to the federal district court. In addition, defendants filed motions for summary judgment asserting that Slaughter's action was time-barred by the six month statute of limitations applic-

able to section 301 hybrid actions for employer breach of contract and union breach of the duty of fair representation. Slaughter filed a motion to remand and a response to the summary judgment motion. The district court concluded that Slaughter's claims were preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, and that the action was time-barred by the six month statute of limitations. The district court entered an order in favor of defendants, and Slaughter filed a timely appeal to this Court.

II. DISCUSSION

Summary Judgment

This Court reviews the propriety of a summary judgment under the same standard that governs the trial court's determination. Summary judgment is proper only if, when the evidence is viewed in the light most favorable to the nonmovant, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Bache v. American Telephone and Telegraph,* 840 F.2d 283, 287 (5th Cir.), *cert. denied sub nom. Bankston v. American Telephone and Telegraph,* ___U.S. ___, 109 S. Ct. 219 (1988). Slaughter concedes that the action was not filed within six months of CWA's notification that it failed to process her grievance. Slaughter, however, argues that the six month statute of limitations is inapplicable to her action because it is not a section 301 hybrid action; rather, she argues that the claim against CWA is a state law negligence claim for breach of a duty imposed by the collective bargaining agreement. Additionally, she characterizes the claim against ATTIS not as a claim of breach of the collective bargaining agreement, but as a claim for breach of the termination plan agree-

ment. Even if her claim against ATTIS is characterized as a section 301 action, Slaughter maintains that it is not inextricably intertwined with the claim against the union, and, therefore, not governed by the six month statute of limitations. We conclude that the district court properly rejected Slaughter's construction of her claims. The cause falls within the parameters defining section 301 hybrid actions. As such, the six month statute of limitations applied and summary judgment was appropriate.

The Supreme Court, in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L.Ed.2d 476 (1983), enunciated the six month statute of limitations applicable to section 301 hybrid actions. A section 301 hybrid action is composed of two distinct causes of action: a section 301 action for breach of the collective bargaining agreement brought against the employer, and an action against the union for breach of the duty of fair representation. *Id.* at 164. The two actions are inextricably interdependent because of the relationship between the duty of fair representation and the enforcement of a collective bargaining agreement. *Bache*, 840 F.2d at 287.

In the instant case, Slaughter has alleged that under the terms of the collective bargaining agreement, CWA had a duty to fairly represent her in a grievance proceeding. She further alleged that CWA breached this duty by failing to pursue a grievance on her behalf. This complaint alleges that the union breached its duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967).[1]

---

1. Slaughter's attempt to distinguish her action from other hybrid claims by pointing out that she is not challenging a private settlement under the agreement because CWA never filed a claim on her

Slaughter relies heavily on the Eleventh Circuit case of *Hechler v. International Brotherhood of Electrical Workers*, 834 F.2d 942 (11th Cir. 1987), *on remand from* 481 U.S. 851, 107 S. Ct. 2161, 95 L.Ed.2d 791 (1987). In *Hechler*, the plaintiff union member sought damages for the union's failure to provide a safe work place as required under the collective bargaining agreement. The Supreme Court held that the state-law tort claim that the union had breached its duty to provide a safe working place was preempted by section 301; however, it remanded the case for a determination of the applicable statute of limitations. On remand, the Eleventh Circuit characterized the claim as a section 301 claim for breach of contract rather than as a claim for breach of the duty of fair representation. The court then analogized the claim to a Florida action for breach of contract and applied Florida's five year statute of limitations since application of the state prescriptive period did not impinge upon federal labor law interests.

The instant case is distinguishable. Slaughter sued ATTIS for breach of contract for its refusal to provide her with termination pay. As a direct corollary of that claim, she alleged that CWA breached its duty under the collective bargaining agreement by failing to file a grievance on her behalf concerning the termination pay dispute. This constitutes a section 301 hybrid claim; Slaughter's claim against the union cannot be characterized as a separate breach of contract as in *Hechler*.

---

behalf is misplaced. In Daigle v. Gulf State Utilities Co., Local No. 2286, 794 F.2d 974, 977 (5th Cir.), *cert. denied*, 479 U.S. 1008 (1986), this Court held that the six month prescriptive period applied in a case where the union was being sued for failing to file a grievance on behalf of a union member.

Slaughter also attacks the propriety of the district court's implicit finding that her claim against ATTIS constitutes a section 301 action for breach of the collective bargaining agreement. She argues that the claim against ATTIS is merely a state law breach of contract claim. Specifically, she argues that she sued ATTIS solely for breach of the termination plan agreement. This claim that the termination agreement is a separate contract completely independent of the collective bargaining agreement is not persuasive. Not only does the termination agreement more fully describe the termination plan benefits provided for in the collective bargaining agreement, but the termination plan specifically references such agreement. It refers to the collective bargaining agreement for the terms of participation in the plan, eligibility for benefits, and the amount of termination pay benefits. Disputes arising under the plan are also subject to the grievance and arbitration provisions of the collective bargaining agreement. The document is not an independent contract; the action is preempted by section 301.

Additionally, Slaughter asserts that because she did not sue for wrongful termination as the plaintiffs in *Del Costello* did, nor did she seek to challenge the outcome of a grievance or arbitration procedure, the six month statute of limitations is inapplicable to her claim against ATTIS. The six month statute of limitations applies to all section 301 hybrid actions where a plaintiff has alleged a breach of a collective bargaining agreement as well as breach of the union's duty of fair representation. Slaughter's action against ATTIS and CWA is a hybrid action to which the six month statute of limitations applies. Slaughter has admitted that her action was not filed within the

six month period. Consequently, summary judgment was proper.

Sanctions

CWA filed a motion seeking imposition of attorney's fees and double costs as sanctions pursuant to Fed. R. App. P. 38. In *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988), this Court held that "an appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." Bad faith is not required to establish that an appeal is frivolous; an appeal is deemed frivolous when an unreasonable legal position is advanced in the absence of a good faith belief that it is justified. *Id.* at 814.

In this case, an award of costs and attorney's fees is not appropriate. Although Slaughter's attempt to analogize *Hechler* to the instant case is not persuasive, her argument is not wholly frivolous. We are not willing to impose Rule 38 sanctions in a manner which has the potential to chill the assertion of reasonable legal arguments. Rule 38 sanctions are inappropriate in the instant case.

III. CONCLUSION

Slaughter's argument that her claim does not constitute a section 301 hybrid action is not persuasive. However, the argument is not entirely without merit. Consequently, we affirm the district court's dismissal, but deny appellee's motion for Rule 38 sanctions.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-486

BARBARA SLAUGHTER,
Plaintiff,

v.

AT&T INFORMATION SYSTEMS, et al.,
Defendants.

FINAL JUDGMENT

Barbara Slaughter takes nothing from AT&T Information Systems, Inc., and Communications Workers of America.

Signed on December 14, 1988, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2058

BARBARA SLAUGHTER,
Plaintiff-Appellant,

v.

AT&T INFORMATION SYSTEMS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(August 8, 1989)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge
8-4-89

APPENDIX D

COLLECTIVE BARGAINING AGREEMENT

ARTICLE XX

GRIEVANCES

Section 1. The Union shall be the exclusive representative of all the employees in the Bargaining Unit for the purposes of presenting to and discussing with the Company grievances of any and all such employees arising from such employment; subject always, however, to the provisions of this Agreement, the current Agreement of General Application between the Union and the Company and of any applicable law.

Section 2.

a. Any employee complaint (except those which contemplate treatment or proceedings inconsistent with the terms of a collective bargaining contract or agreement then in effect including proposals for the modification of, or addition to, any such contract or agreement) which is reduced to writing and delivered by a Union representative in accordance with Section 2. b. following, within 45 days of the action complained of shall be considered and handled as a formal grievance.

b. The grievance procedure shall normally consist of three successive steps. Notice of grievances and appeals of decisions made at the first and second steps shall be forwarded in accordance with the following:

Step Number	Company Representative Designated To Receive Grievance
1	Division level manager having supervisory authority over the conditions or circumstances

which gave rise to the grievance. (In the absence of a Division level, the notice of the grievance shall be forwarded to the District level manager having the supervisory authority.)

or

Section Head level manager having supervisory authority over the involved conditions or circumstances if the grievance involves employees in more than one Division organization. If the grievance is initially filed at this level, any appeal of such a decision shall be filed at Step Number 3.

or

Vice President-Personnel or designated representative if the grievance involves employees in more than one Section level organization. If the grievance is initially filed at this level there shall be no successive steps.

2 The manager who supervises the individual to whom the first level grievance notice was directed.

3 Vice President-Personnel or designated representative.

c. If the grievance involves or affects only employees reporting to a single immediate supervisor, a copy of the notice shall also be forwarded at the same time to such supervisor.

Section 3.

a. The decision made at either of the first two levels of the grievance procedure may be appealed to the next higher level of the grievance procedure provided such appeal is submitted within two weeks of the date the decision is communicated to the Union.

b. A decision at the 3rd level of the grievance procedure or default on the Company's part to meet with the Union, as explained in Section 7, at the 3rd level shall be construed as full completion of the "Formal Grievance" procedure.

c. At the Union's request, the decision of the Company as to grievances submitted shall be confirmed in writing to the Union.

Section 4. So that the Union may present formal grievances to the appropriate Company representative, the Company will notify the Union of changes in Company organization that require a change in the then existing manner of presentation.

Section 5. After a notice as set forth in Section 2. b., above has been received by the Company, the Company will not attempt to adjust the grievance with any employee or employees involved without offering the Union an opportunity to be present.

Section 6. At any meeting held pursuant to Section 2 above, the Company will designate its representative(s) to meet with the aggrieved employee(s), the representative(s) designated by the Union, or both.

Section 7. Meetings at each level of the grievance procedure shall be arranged promptly. If, due to the Company's actions, a mutually agreeable meeting date

is not arranged within two weeks of either the Company's receipt of the initial notification or the appeal of the grievance, the Union may present its original grievance to the next higher level of the formal grievance procedure.

Section 8. The place of the meeting at each level of the grievance procedure shall be mutually agreed upon, with each party giving due consideration to the convenience of the other.

Section 9. Those employees of the Company including the aggrieved employee(s) and the employee representative(s) designated by the Union, who shall suffer no loss in pay for time consumed in, and necessarily consumed in traveling to and from, grievance meetings shall not be more than three at any level of the grievance procedure.

Section 10. At any meeting held under this Article for the adjustment of a grievance or complaint, any party present (including Union or Company representatives) shall be afforded full opportunity to present any facts and arguments pertaining to the matter or matters under consideration. The decision made upon such facts and arguments shall be made as promptly after conclusion of the presentation as may be reasonably and effectively possible.

Section 11. Any complaint which is not delivered in writing by the Union as specified in Section 2 above, shall be handled by the Company as an informal complaint on an informal basis; provided, however, that nothing in this Article shall preclude the Union and the Company from using any other mutually satisfactory and proper method of presentation, discussion, and disposition of grievances.

ARTICLE IV

ARBITRATION

Section 1. If, during the term of this Agreement, with respect to the 1983 Departmental Agreement effective August 7, 1983, between the Union and the Company, and subsequent agreements which by specific reference therein are made subject to this Article, a difference shall occur, between the Union and the Company, and continue after all steps in the "Formal Grievance" procedure established in the 1983 Departmental Agreement shall have been undertaken and completed, regarding,

a. the true intent and meaning of any specific provision or provisions thereof (except as such provision or provisions relate, either specifically or by effect, to prospective modifications or amendments of such agreement), or

b. the application of any provision or provisions thereof to any employee or group of employees, and grievances arising from such application, or

c. the dismissal for just cause of any employee with more than one completed year's net credited service, or

d. the disciplinary suspension for just cause of any employee

then in any such event, either the Union or the Management may submit the issue of any such matter to arbitration for final decision in accordance with the procedure hereinafter set forth or, where applicable, in accordance with Article V of this Agreement.

Section 2. In the event that either party hereto, within 60 days after completion of the Formal Grievance pro-

cedure aforesaid, elects to submit a matter described in the preceding section to arbitration the parties agree that the matter shall be so submitted, and agree that such submission shall be to one arbitrator. The parties shall endeavor in each instance within a three weeks' period to agree upon the arbitrator, but if unable to so agree, the arbitrator shall be designated by the American Arbitration Association upon the written request of either party. In either such event, the arbitration shall be conducted under the then obtaining rules of the Voluntary Labor Arbitration Tribunal of the American Arbitration Association. Each party shall pay for the time consumed by and the expenses of its representatives, and shall be equally responsible for the fees of the American Arbitration Association, the compensation, if any, of the arbitrator, and any such other general administrative expense that may occur.

After an election to arbitrate, if within 90 days following completion of the Formal Grievance procedure no arbitrator has been agreed upon and no written request has been made upon the American Arbitration Association to designate an arbitrator, then no such matter shall continue to be arbitrable.

Section 3. The arbitrator shall be confined to the subjects submitted for decision, and may in no event, as a part of any such decision, impose upon either party any obligation to arbitrate on any subjects which have not herein been agreed upon as subjects for arbitration; nor may the arbitrator, as a part of any such decision, effect reformation of the contract, or of any of the provisions thereof.

Section 4. The decision of any arbitrator, selected in accordance with Section 2 hereof, shall be final, and the parties agree to be bound and to abide by such decision.

Section 5. If and when notice of termination of this Agreement be given as provided in the Duration Article hereof, any existing dispute described in Section 1 hereof as an appropriate subject for arbitration which is in the process of Formal Grievance negotiation of record prior to the service of such notice of termination, or, if such an existing dispute appropriate under Section 1 hereof shall become a matter of record in the process of Formal Grievance negotitation in the manner and within the time limit prescribed for filing Formal Grievances, then in either such event any such matter may be carried to a conclusion under this Article without regard to the termination of this Agreement.

89-766
NO. .....

IN THE

Supreme Court of the United States

OCTOBER 1989 TERM

BARBARA SLAUGHTER,
Petitioner

v.

AT&T INFORMATION SYSTEMS, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTINA RICHARD
Attorney of Record
LINDA C. SCHOONMAKER
HOLTZMAN & URQUHART
900 Two Houston Center
909 Fannin Street
Houston, TX 77010
(713) 739-0000
Attorneys for Respondent

RULE 28.1 LISTING

The parties to the proceedings below were Petitioner Barbara Slaughter, Respondent AT&T Information Systems, Inc., and Communications Workers of America. In accordance with SUP. CT. R. 28.1, Respondent lists the following parent company:

1. American Telephone & Telegraph, Co.

Respondent lists the following subsidiaries, other than wholly-owned subsidiaries:

1. AT&T Videolink, Inc.
2. Counterpoint Computers, Inc.
3. Covidea

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

NO. .....

IN THE

Supreme Court of the United States

OCTOBER, 1989 TERM

BARBARA SLAUGHTER,

Petitioner

V.

AT&T INFORMATION SYSTEMS, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, AT&T INFORMATION SYSTEMS, INC., respectfully prays that Petitioner's request for review by certiorari be denied.

STATEMENT OF THE CASE

Petitioner is a former union-represented employee of Respondent. In 1986, when Petitioner terminated her employment with Respondent, Petitioner contended that she was a surplus employee entitled to termination pay. Respondent, however, maintained that Petitioner was not a surplus employee, refused to pay her termination pay and alternatively paid Petitioner a lesser amount under the Supplemental Income Protection Program ("SIPP"). Both termination pay and SIPP payments were employee benefits provided for in the Collective Bargaining Agreement

between Petitioner's union, the Communications Workers of America ("CWA"), and Respondent (App.A, *infra*).

Petitioner requested that the CWA file a grievance with Respondent regarding her entitlement to termination pay. The CWA did not file a timely grievance. In June 1986, Petitioner's attorney sent a letter both to Respondent and the CWA protesting the CWA's handling of the case and Respondent's refusal to award termination pay. Petitioner, however, delayed filing this lawsuit against Respondent and the CWA until January 1988.

In this lawsuit, Petitioner alleges that the CWA breached its duty of fair representation by failing to file a grievance, and that Respondent breached the collective bargaining agreement by failing to pay termination pay. Respondent and the CWA removed the lawsuit to federal district court because federal labor laws preempted Petitioner's state law causes of action. Respondent and the CWA also moved for summary judgment on the ground that Petitioner's cause of action was barred by the limitations period for a hybrid duty of fair representation/§ 301 suit. The district court granted summary judgment, and dismissed the lawsuit as untimely filed. The Fifth Circuit Court of Appeals affirmed the district court's ruling and denied Petitioner's request for a rehearing.

REASONS FOR DENYING THE PETITION

Contrary to Petitioner's assertion, the lower courts did not depart from the accepted and usual course of judicial proceedings in dismissing Petitioner's action against Respondent and the CWA because it was untimely filed. In affirming the dismissal, the Fifth Circuit Court of Appeals applied well-established principles of law enunciated by this Court and followed by every circuit court of appeals in this nation. Consequently, this case does not merit review by this Court.

Moreover, Petitioner raises no other bases for review under SUP. CT. R. 17.

Petitioner's claim is nothing more than a hybrid duty of fair representation/§ 301 suit and is therefore subject to the six-month limitations period announced by this Court in *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983). Because Petitioner did not file her lawsuit until at least eighteen months after her cause of action accrued, the lower courts correctly applied *DelCostello* and held that Petitioner's action was time-barred.

A hybrid duty of fair representation/§ 301 suit is an action in which an employee seeks redress for breach of a collective bargaining agreement by claiming that the union breached its duty of fair representation and that the employer breached a collective bargaining agreement. *DelCostello*, *supra*, at 164-65. Petitioner's complaint evokes this hybrid cause of action in nearly every paragraph (App.B, *infra*, at ¶¶ III, IV, VI, VII, VIII). Consequently, this action falls squarely within *DelCostello* and is barred by limitations.

Petitioner attempts to avoid this bar by arguing that this Court's decision in *IBEW* v. *Hechler*, 481 U.S. 851, 107 S.Ct. 2161 (1987) governs this dispute, and therefore her claim was not subject to the *DelCostello* six-month limitations period. Petitioner's attempt to fit the facts of this case into the rubric of *Hechler* must fail.

In *Hechler*, plaintiff brought suit against her union claiming that the union breached its duty to provide her a reasonably safe workplace. Although the union did not owe this duty to plaintiff under the applicable state law, plaintiff alleged that the union assumed this duty when it entered into collective bargaining and ancillary agreements with her employer. *Hechler*, *supra*, at 2167. Because questions of contractual interpretation underlay Hechler's tort claim, this Court found that Hechler could not evade the preemptive

force of federal labor law by casting her claim as a state law tort action. This Court, however, remanded the action to the court of appeals to determine whether the six-month limitations period of *DelCostello* applied to Hechler's claim.

On remand, the Eleventh Circuit determined that Hechler's cause of action was not a duty of fair representation claim, but rather a claim for a breach of contract against her union and applied the state limitations period for breach of contract. *Hechler* v. *IBEW*, 834 F.2d 942, 946-47 (11th Cir.), *on remand from* 481 U.S. 851 (1987).

This determination, however, has no application to this dispute. Unlike Petitioner, Hechler sued only the union and not her employer. Consequently, the Eleventh Circuit was not presented with the question of whether Hechler's suit was a hybrid duty of fair representation/§ 301 suit.

Hechler provides only that not every action against a union constitutes a claim for breach of the duty of fair representation. Petitioner, however, is not challenging the lower courts' rulings that her claim against the CWA constituted a breach of the duty of fair representation suit. The only issue which Petitioner seeks to review is whether her action is a hybrid cause of action, or purely a § 301 cause of action against her employer.

Petitioner cannot complain that her cause of action has been mischaracterized by the lower courts. Petitioner alleged that, under the terms of the collective bargaining agreement, the CWA had a duty to fairly represent her in a grievance proceeding. Petitioner further alleged that the CWA breached this duty by failing to pursue a grievance on her behalf and that the union's lack of action foreclosed her ability to have an arbitrator hear her complaint that Respondent breached the collective bargaining agreement (App. B, *infra*, at ¶¶ VI, VIII). These allegations can only be

characterized as a hybrid duty of fair representation/§ 301 action. *See Vaca* v. *Sipes*, 386 U.S. 171 (1967).

Petitioner seeks to avoid the application of the *DelCostello* six-month limitations period by asserting that, in the absence of exclusive and final grievance and arbitration clauses in the collective bargaining agreement, her § 301 cause of action is governed by the state law limitations period. Petitioner claims that the use of the word "may" in the arbitration clause of the collective bargaining agreement demonstrates that arbitration is not an exclusive remedy. In asserting this claim, however, Petitioner completely ignores *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

In *Republic Steel*, this Court stated that an arbitration clause contained in a collective bargaining agreement is mandatory unless the parties to the agreement expressly provide that arbitration *is not* the exclusive remedy. *Id.* at 657-58. Petitioner also misconstrues *Daigle* v. *Gulf States Utilities Co.*, 794 F.2d 974 (5th Cir.), *cert. denied*, 479 U.S. 1008 (1986). In *Daigle*, the Fifth Circuit held that a state law limitations period for breach of contract applied to a § 301 lawsuit if the collective bargaining agreement did not provide an exclusive and final grievance and arbitration procedure. *Daigle, supra*, at 977. In *Daigle*, however, the record contained *no* evidence that the collective bargaining agreement had *any* grievance or arbitration clause. Consequently, it was impossible for the court to determine whether the employee was bound to exhaust his contractual remedies.

The Fifth Circuit clearly understands and applies the requirements of *Republic Steel*. In *Bache* v. *American Tel. & Tel.*, 840 F.2d 283 (5th Cir. 1988), the court, citing *Republic Steel Corp.*, 379 U.S. at 657-58, explained that "[t]he general rule of exhaustion is inapplicable *'if the parties to the collective bargaining agreement expressly agreed that arbitration*

was not the exclusive remedy' for the breach of contract at issue" (emphasis added). *Bache, supra,* at 288.

In this action, the collective bargaining agreement contains an arbitration and grievance provision. There is no language which *expressly* states that arbitration is not the exclusive remedy. The language on which Petitioner relies, "either the Union or the Management may submit the issue of any such matter to arbitration for final decision," is common contract language which means that either party to the contract may choose to take an issue to arbitration or both sides may choose to abide by the result reached in the grievance process. Were the language mandatory rather than permissive, the parties would be placed in the untenable position of being forced to arbitrate every grievance not settled during the grievance procedure.

In no event, however, does the language create an express statement that the process is not binding and is not exclusive. Merely including permissive language in the arbitration clause does not "reveal a *clear understanding* between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a federal suit. *Any doubts must be resolved against such an interpretation." Republic Steel Corp., supra,* at 658-59 (emphasis added).

Petitioner makes no attempt to resolve the conflict between her interpretation of *Daigle* and the pronouncements of this Court in *Republic Steel* and the Fifth Circuit in *Bache.* Read in conjunction with *Bache,* it is clear that *Daigle* is not inconsistent with the Fifth Circuit's ruling in this action. More importantly, the Fifth Circuit's ruling on Petitioner's claims is entirely consistent with this Court's decisions.

Finally, there are no grounds for granting the petition for writ of certiorari. As has been demonstrated, the lower

courts did not depart from the accepted and usual course of judicial proceedings in dismissing Petitioner's lawsuit. Contrary to Petitioner's claim, there is no inconsistency between the Fifth Circuit's decision in *Daigle, supra,* and in this case. Moreover, conflicting decisions within a circuit is not an enumerated consideration for determining whether to grant a petition for writ of certiorari. SUP. CT. R. 17. The Fifth Circuit Court of Appeals correctly applied the principles of federal labor law to this case. That application is clearly consistent with rulings of other circuits and this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTINA RICHARD
Attorney of Record

LINDA C. SCHOONMAKER
HOLTZMAN & URQUHART
900 Two Houston Center
909 Fannin Street
Houston, TX 77010
(713) 739-0000

Attorneys for Respondent

APPENDIX A
COLLECTIVE BARGAINING AGREEMENT

ARTICLE XIX

EMPLOYMENT TERMINATIONS

Section 1. **Payment of Termination Allowance.** A regular or temporary employee shall receive a termination allowance computed as provided in Section 3 of this Article when the service of the employee is terminated under the following conditions:

a. Laid off because there is not enough work in the exchange to warrant retaining the employee in the service where he or she is employed;

b. Retired at age 70 without a pension;

c. Dismissed, except for reasons of misconduct, after having three or more years of Net Credited Service;

d. After a leave of absence when no work is available provided there was every reasonable expectancy at the time the leave was granted that the employee would return to work and the employee is willing and able to do so.

Note: No termination allowance shall be due the employee in any case where the separation is the result of retirement on pension, death, transfer, or resignation.

Section 2. **Technological Displacement.** If during the term of this Agreement, the Company notifies the Union in writing that technological change (defined as changes in equipment or methods of operation) has or will create a surplus in any job title in a work location which will necessitate reassignments of employees to different job titles involving a reduction in pay or to locations requiring a change in residence, or if a force surplus necessitating any of the above

actions exists for reasons other than technological change and the Company deems it appropriate, any employee:

a. who is in the affected job titles and work location; and

b. who is not eligible for a service pension,

may elect not to accept such reassignment to a job title involving a reduction in pay or to a location requiring change in residence and shall be terminated and paid a termination allowance. Any such employee who refuses to accept a transfer to a job title having the same or greater rate of pay and which does not require a change in residence shall not be paid a termination allowance.

Employees eligible for a termination allowance under the terms of this provision alternatively may elect to participate in the Voluntary Income Protection Program (VIPP) providing they meet the eligibility requirements of that program.

Section 3. **Amount of Termination Allowance.** Any termination allowance payable under this Article shall be computed as follows:

1 week's pay for each completed year of Net Credited Service up to and including 5 years; plus

2 weeks' pay for each completed year of Net Credited Service from 6 years to 10 years, both inclusive; plus

3 weeks' pay for each completed year of Net Credited Service from 11 years to 13 years, both inclusive; plus

4 weeks' pay for each completed year of Net Credited Service beyond 13 years.

Section 4. **Reengaged or Rehired Employees.** Payment of termination allowance to employees who have been reengaged or rehired is subject to the following conditions:

a. An employee reengaged and again laid off after having former service credited will be paid the difference

between the amount computed under a termination allowance plan and any previous payment such employee may have received on account of a previous layoff.

b. If an employee who has received a termination allowance is rehired and the number of weeks since the date of layoff is less than the number of weeks upon which the allowance was based, the amount paid to that employee for the excess number of weeks shall be considered as an advance and repayment will be made through payroll deduction in the amount of 10% of the weekly wage until the amount is fully paid.

Section 5. **Week's Pay.** A week's pay for the purpose of these computations (other than for Directory Representatives and Coupon Sales Representatives) shall be the basic pay of the employee and any extra payments for such evening or night tours as were in effect for the employee's regular assignment at the time of service termination. A week's pay for the purpose of these computations for Directory Representatives and Coupon Sales Representatives will be determined in the same manner as provided in Article XXVII and Article XXVIII, respectively, for vacation pay.

ARTICLE VIII

SUPPLEMENTAL INCOME PROTECTION PROGRAM

Section 1. If during the term of this Agreement, the Company notifies the Union in writing that technological change (defined as changes in equipment or methods of operation) has or will create a surplus of any job title in any work location which will necessitate layoffs or involuntary permanent reassignments of regular employees to different job titles involving a reduction in pay or to work locations

requiring a change of residence, or if a force surplus necessitating any of the above actions exists for reasons other than technological change and the Company deems it appropriate, employees under the normal retirement age as defined in the Bell System Pension Plan (BSPP) or its applicable successor Plan, as of the effective date of termination of employment (whether or not eligible for a service pension) in the affected job titles and work locations who have at least twenty years of net credited service and whose age and years of net credited service, in sum, total seventy-five or more as of the effective date of the termination of employment, may elect, in the order of seniority, and to the extent necessary to relieve the surplus, to leave the service of the Company and receive Supplemental Income Protection benefits described in Section 4 of this Article subject to the following conditions:

a. The Company shall determine the job titles and work locations in which a surplus exists, the number of employees in such titles and locations who are considered to be surplus, and the period during which the employee may, if he or she so elects, leave the service of the Company pursuant to this Article. Neither such determinations by the Company nor any other part of this Article shall be subject to arbitration.

b. The number of employees who may make such election shall not exceed the number of employees determined by the Company to be surplus.

c. An employee's election to leave the service of the Company and receive Supplemental Income Protection benefits must be in writing and transmitted to the Company within 30 days from the date of the Company's offer in order to be effective and it may not be revoked after such 30 day period.

Section 2. Subject to the limitations in Sections 4 and 6, employees who so elect to leave the service of the Company and receive Supplemental Income Protection benefits may receive in combination with such benefits either (i) a retirement service pension if eligible for such pension or, if not eligible, (ii) a termination allowance, if otherwise entitled, in an amount determined in accordance with basic contract provisions, but not both.

Section 3. Supplemental Income Protection payments for employees who so elect to leave the service of the Company in accordance with Section 1 shall begin within one month after such employee has left the service of the Company to continue until (i) 48 payments have been made; or (ii) the end of the month in which the recipient attains normal retirement age as defined in the BSPP, or its applicable successor Plan, whichever occurs earlier.

Section 4. For an employee who so elects in accordance with Section 1, the Company will pay monthly as Supplemental Income Protection payments; (i) $8.00 for each year of net credited service (including a prorated amount for any partial year of net credited service) plus (ii) 40% of the final full-time basic weekly or equivalent wage rate for the employee's job title and location adjusted as set forth in Section 5 for any periods of part-time service of the employee. In no case, however, shall the monthly payment hereunder exceed in aggregate a total of $400.00 per month. In addition to the monthly benefits, for an employee who so elects in accordance with Section 1, the Company will pay a lump sum payment based on years of net credited service (prorated for part-time service as set forth in Section 5) as follows:

20 to 25 years	$2000
25 to 30 years	$2500
30 years and Over	$3000

Such lump sum payment will be made within sixty (60) days after the employee has left the service of the Company or, at the employee's option, will be made in the first quarter of the calendar year following the employee's termination of service. The maximum amount of Supplemental Income Protection benefits payable including any lump sum payment shall in no event exceed a total of $22,200.

Section 5. The years of net credited service and the final full-time basic weekly or equivalent wage rate as used in the preceding Section for purposes of determining the monthly payment and the lump sum payment shall be prorated for any period of time during which an employee is employed on a part-time basis in the proportion of such employee's basic rate of pay during any such period to the basic rate of pay for an equivalent full-time employee in the same job title, classification, and work group during the same period in the same manner as calculated in the BSPP or its applicable successor Plan.

Section 6. In no event shall the combination of Supplemental Income Protection payments (including any lump sum payment) and any termination, layoff or similar allowance paid exceed the equivalent of twice the employee's annual compensation at the basic weekly wage rate (or its equivalent) received during the year immediately preceding the termination of service. To the extent necessary, Supplemental Income Protection payments shall be reduced by the amount of any termination, layoff or similar allowance paid to the employee so that the combination of Supplemental Income Protection payments and termination or other allowance payments does not exceed the equivalent of twice the employee's annual compensation at the basic weekly wage rate (or its equivalent) for the year immediately preceding the termination of service.

Section 7. As used in this Article, "annual compensation at the basic weekly wage rate (or its equivalent)" or "basic weekly wage rate (or its equivalent)" do not include tour or temporary differentials, overtime pay, or other extra payments.

Section 8. In addition to the conditions set forth above, any payments to a recipient hereunder shall be suspended upon the happening of any of the following:

a. Reemployment of the recipient by the Company; or

b. Employment of the recipient by an affiliate or subsidiary company within the same control group of companies as is the Company.

APPENDIX B

NO. 88G0036

BARBARA SLAUGHTER	§	IN THE DISTRICT
VS.	§	COURT OF BRAZORIA
AT&T INFORMATION	§	COUNTY, TEXAS
SYSTEMS, INC. AND	§	239TH JUDICIAL
COMMUNICATIONS	§	DISTRICT
WORKERS OF AMERICA	§	

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

BARBARA SLAUGHTER, Plaintiff in the above numbered and entitled cause, files this her Original Petition complaining of AT&T INFORMATION SYSTEMS, INC. AND COMMUNICATIONS WORKERS OF AMERICA, Defendants herein, and for cause of action would show this Court as follows:

I.

Plaintiff is a resident of Brazoria County, Texas. Defendant AT&T INFORMATION SYSTEMS, INC. (hereinafter called "ATTIS") is a corporation authorized to do business in the State of Texas who may be served with process by delivering a copy of this petition to C.T. Corporation Systems, its registered agent for service, at 1601 Elm Street, Dallas, Texas. Defendant COMMUNICATIONS WORKERS OF AMERICA (hereinafter called "CWA") is a labor union association which may be served with process by delivering a copy of this petition to Mr. Jack Limmroth at 2121 San Jacinto Street, Suite 1414, Dallas, Texas.

II.

Venue of this cause of action is proper in Brazoria County, Texas under Sec. 15.036, Texas Civil Practice and Remedies Code, because all or a part of the cause of action asserted by Plaintiff arose in Brazoria County, Texas.

III.

For a period in excess of thirty (30) years, Plaintiff was employed by Southwestern Bell Telephone Company, or its successor in certain respects, ATTIS. During all or part of such employment, and at all times material hereto, Plaintiff was represented as a bargaining unit by CWA under a collective bargaining agreement.

IV.

Plaintiff was advised by her employer, ATTIS, sometime in January, 1986, that her place of work in the Clute/Lake Jackson, Texas area had been declared closed by ATTIS as a part of a reorganization of Plaintiff's department. Plaintiff was offered a transfer to ATTIS' office at 255 Northpoint, Houston, Texas, a distance of over fifty (50) miles from her residence in Angleton, Texas. As was her right under her agreement with ATTIS, Plaintiff elected not to take the transfer, and her employment with ATTIS was terminated effective February 28, 1986.

V.

At the time of her termination, Plaintiff was a non-management employee represented by a union. Although ATTIS has denied coverage, Plaintiff was a designated surplus employee under ATTIS' Force Management Guidelines whose employment was terminated by ATTIS as a surplus employee. As such, Plaintiff became eligible for termination

pay as provided under a termination payment plan for surplus union represented non-management employees of ATTIS. Plaintiff, although entitled to receive termination plan pay of $59,018.00 under the formula provided by ATTIS, was denied coverage under such plan by ATTIS. Plaintiff was coerced involuntarily, under threat of dismissal for cause (and thus forfeiting certain retirement benefits), to waive any claim to termination pay and forced to elect supplemental income protection program (SIPP) benefits which were considerably less than termination pay.

VI.

Plaintiff complained to officials of CWA about her coerced election of SIPP benefits and was assured by CWA officials that they would assert a grievance with ATTIS management about Plaintiff's treatment. Under the terms of the collective bargaining agreement then in effect, CWA owed Plaintiff a duty to fairly represent her in such grievance action. Contrary to their express representations, CWA officials negligently failed to timely assert Plaintiff's grievance under the procedures set out in the collective bargaining agreement between ATTIS and CWA and thus forfeited Plaintiff's right to arbitration under the said agreement.

VII.

Under the express terms of the termination payment plan adopted by ATTIS effective October 1, 1985, Plaintiff was a covered employer and entitled to its benefits as a third-party beneficiary of such plan agreement. ATTIS breached such agreement with Plaintiff, causing loss of termination pay to her in the amount of $59,018.00. Plaintiff received the sum of $22,200.00 as SIPP benefits; accordingly, she is entitled to recover additional termination payments in the amount of $36,818.00.

VIII.

CWA owed Plaintiff a duty of fair representation insofar as Plaintiff's right to recover termination pay from ATTIS was concerned. CWA breached such duty to Plaintiff when it failed to take the necessary procedural steps to timely assert Plaintiff's rights to ATTIS management and to preserve her rights under the collective bargaining agreement between CWA and ATTIS. Such a breach constituted negligence on the part of CWA which negligence was the proximate cause of damage to Plaintiff in an amount in excess of the minimum jurisdictional amount of this Court.

IX.

ATTIS economically coerced Plaintiff into accepting SIPP benefits by unlawfully threatening to terminate Plaintiff's employment with ATTIS for cause, on the asserted grounds of insubordination and job abandonment. Such job termination would have adversely affected Plaintiff's accrued pension benefits. Such unlawful coercion left Plaintiff with no reasonable economic choice other than to accept ATTIS' terms of termination, although Plaintiff sought to reserve her rights to seek a grievance as to the denial of her rights to termination pay. Such an attempt to reserve her rights was denied Plaintiff by ATTIS, who forced Plaintiff to unconditionally elect SIPP payments in lieu of any other benefits. Such economic duress was the proximate cause of damage, both pecuniary and emotional, to Plaintiff in excess of the minimum jurisdiction of this Court.

X.

Both the conduct of ATTIS and CWA was committed knowingly and in intentional disregard of the rights of Plaintiff to the extent that such Defendants are guilty of malice, as that term is known under law. As a result, ATTIS and CWA

should be punished for such malicious conduct toward Plaintiff by awarding Plaintiff exemplary damages against both ATTIS and CWA in an amount found necessary by the trier of facts to deter similar conduct in the future.

XI.

Written demand for amounts due Plaintiff from ATTIS for its breach of its agreement with Plaintiff was made to ATTIS on July 1, 1986. Accordingly, under Sec. 38.001, et seq., Texas Civil Practice and Remedies Code, Plaintiff is entitled to recover reasonable attorney's fees from ATTIS, as follows:

1.	For preparation and trial of this case;	$25,000.00
2.	For any appeal to the Court of Appeals; and	5,000.00
3.	For any application for writ of error to the Texas Supreme Court.	5,000.00

WHEREFORE, PREMISES CONSIDERED, BARBARA SLAUGHTER, Plaintiff, prays that Defendants AT&T INFORMATION SYSTEMS, INC. AND COMMUNICATIONS WORKERS OF AMERICA be cited to appear and answer herein and upon final hearing hereof Plaintiff have and recover judgment as follows:

1. From ATTIS the sum of $36,818.00 for breach of agreement;
2. From ATTIS, a sum in excess of the minimum jurisdiction of this Court for economic duress;
3. From CWA, a sum in excess of the minimum jurisdiction of this Court for negligence;
4. From ATTIS, reasonable attorney's fees for breach of its agreement with Plaintiff as set out above;
5. Exemplary damages from both ATTIS and CWA as found by the trier of facts;

6. Pre-judgment interest at the highest rate allowed by law from and after February 28, 1986;
7. Post-judgment interest at the highest rate allowed by law;
8. Costs of court; and
9. Such other and further relief to which Plaintiff may show herself justly entitled.

Respectfully submitted,
McCONNELL & KLEMENT, P.C.

By: _____
GARY L. McCONNELL AND
LYNN J. KLEMENT
105 South Chenango
P.O. Box 1667
Angleton, Texas 77515
(409) 849-2311
STATE BAR NO. 13442600
STATE BAR NO. 11567900
Attorneys for Plaintiff